Supreme Court, U.S.
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90-1268

CASE NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

AT WASHINGTON, DISTRICT OF COLUMBIA
October, 1990 Term

RICHARD V. SECORD,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

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On Appeal from the Supreme Court of Virginia

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I

Did the court err in not striking the evidence in that the police officer did not have a reasonable, articuable suspicion to stop the Defendant where the officer's only reason to stop the Defendant was the Defendant driving with his bright lights and there was no evidence that raised a suspicion of criminal activity?

II

Did the court err in not suppressing the breathalyzer certificate as no printout was made of the breathalyzer test and no printout was given to the Defendant denying the Appellant due process and equal protection of the law, denying him potential exculpatory evidence, denying him effective cross-examination of government witnesses and denying him the right to effective assistance of counsel?

III

Did the court below err in considering the breathalyzer test (and/or not striking it) and in finding the Defendant guilty where a qualified expert witness testified, to a reasonable degree

of medical certainty, that the Defendant had alcohol in his mouth at the time of the breathalyzer test, and another qualified expert witness testified that then the breathalyzer results were inaccurate, said evidence being unrebutted and inherently credible and the Court retained then a presumption that the Defendant was guilty, there being no other evidence of the Defendant's alcohol level?

## LIST OF PARTIES

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## JURISDICTION AND

## STATEMENT OF CASE AND MATERIAL PROCEEDINGS

The Defendant, Richard V. Secord, Appellant herein, was charged with violation of Subsection 18.2-266 of the 1950 Code of Virginia, as amended alleging that he did, on or about February 26, 1989, unlawfully drive or operate a motor vehicle while under the influence of alcohol. The case was first heard in the Fairfax County General District Court, and an appeal was taken to the Circuit Court for the County of Fairfax, Virginia, the appeal having been properly perfected. The Defendant, by counsel, subpoenaed the breathalyzer operator, and subpoenaed various logs, checklists, alcohol analysis logs, repairs, maintenance and other information with regard to breathalyzer

instrument No. 1020445, (the Smith & Wesson 900-A Breathalyzer used in this case) from the Police Department, ASAP, and representatives of Consolidated Laboratories, and also subpoenaed breathalyzer instrument No. 1020445 itself.

A Motion to Quash was filed by the Commonwealth and was argued before the Honorable Michael McWeeny on August 23, 1989. The Motion to Quash was granted as to: (A) The breathalyzer instrument itself; and (B) As to logs and other materials which were more than one year before the date of the offense.

The Defendant filed a Motion to Quash the evidence and results of the alcohol test and/or the breathalyzer certificate (attached hereto as Appendix A) which was argued before the Honorable

Thomas A. Fortkort on August 24, 1989. A proffer was accepted by the Court and in part challenged by the Commonwealth acknowledging that the machine used was a Smith & Wesson 900-A, and that no printout of the result was made or copy given to the Defendant, but denying that the Smith & Wesson 900-A is capable of producing a printout indicating the needle reading from a breathalyzer test.

The Motion was continued to the day of trial on September 28, 1989, so the Commonwealth could produce evidence on the issue. After hearing further evidence, the Court ruled that although the Smith & Wesson 900-A was capable of producing a printout, it was not automatic as contemplated within Subsection 18.2-268(c) of the 1950 Code of Virginia, as amended, and therefore

denied the Motion. The Defendant was immediately tried without a jury. Fairfax County Police Officer P.J. Geis testified, and the Commonwealth moved into evidence the certificate of breath alcohol analysis (Appendix A) over objection of the Defendant. A Motion to strike was made and denied. The Defendant offered expert testimony to rebut the accuracy of the breathalyzer in this case. The Commonwealth offered no rebuttal evidence. The Defendant renewed his Motion to strike, which was denied. The Court found the Defendant guilty and issued a Final Order October 10, 1989 (a copy of which is attached hereto as Appendix B). Thereafter, the transcripts were timely filed and the Court entered an Order certifying the transcripts on November 2, 1989. Notice of the appeal

was timely given. Oral argument was heard for the Petition for Appeal on June 18, 1990.

The Court of Appeals entered an Order on July 10, 1990, denying the Petition for Appeal. (Appendix C) A Petition for Rehearing was timely filed; the Court of Appeals entered an Order denying the appeal and reconsideration on August 7, 1990. (Appendix D) A petition for appeal was timely filed in the Supreme Court of Virginia which was denied November 6, 1990.

This Petition for Writ of Certiorari is from the Final Order of the Supreme Court of Virginia pursuant to 28 U.S.C. 1257, and is timely filed.

FACTS

At the hearing on August 23, 1989, before the Honorable Michael McWeeny, the

Court considered a Motion to Quash the subpoenas duces tecum filed by the Defendant. The Defendant had subpoenaed the breathalyzer instrument which had been used in the instant case, along with all logs, repair records and other records relating to the instrument. The Court granted the Motion to Quash as to the instrument itself, and granted it as to logs and records more than one year prior to the date of the incident. (Tr. 8/23/89).

The Commonwealth's evidence was that on February 26, 1989, at 12:45 a.m., the Defendant was observed driving north on Reston Avenue in Fairfax County, Virginia. (Tr. 9/28/89, p. 57). Officer P.J. Geis, a Fairfax County police officer was driving southbound on the same roadway, which was a total of four

lanes with a median of ten to twelve feet in the middle. (There is some question as to the actual time, as the police officer indicates in his notes that the breathalyzer sample was taken at "0009 hours" and was later changed by him to "1009 hours", not because of any independent recollection, but because "0009 hours" was inconsistent with the breathalyzer certificate.) (Tr. 9/28/89, p. 75-76, and Commonwealth's Exhibit 2).

The Defendant was stopped by the police officer because the Defendant was driving with high beams. (Tr. 9/28/89, p. 58-59). There was no other evidence offered as to why the police officer stopped the vehicle, nor was there any evidence offered of any law or crime being committed. When Officer Geis approached the vehicle, he testified that

he noticed three individuals in the vehicle and detected an odor of alcoholic beverage (Tr. 9/28/89, p. 60 and 64). He asked the Defendant whether or not he had been drinking and received an affirmative response. The officer did not recall which field sobriety tests he administered (Tr. 9/28/89, p. 74) but stated he usually gives more than the two he had written down. As to the two he wrote down, he had asked the Defendant to recite the alphabet, and when he got to where the police officer believes the letter "G" should have been, the Defendant said "J", and that the officer noted that he skipped the letter "H". The officer further testified that when counting backward from 100, the Defendant missed the number "92". (Tr. 9/28/89, p. 63). It was late, it was cold, and the

Defendant was standing outside, between his car and the police cruiser; he may not have been wearing a coat, and was probably wearing eyeglasses as required by his driver's license. (Tr. 9/28/89, p. 71,82,98,99).

The officer testified that normally he has a defendant walk a straight line heel-to-toe, and/or asks him to touch his nose with his index finger, but he would only have written those down in his notes if the Defendant had performed them improperly. (Tr. 9/28/89, p. 74,75,77). Officer Geis then offered the Defendant an alkasensor and took the Defendant to the Reston Police Station. (Tr. 9/28/89, p. 68). The officer testified that he waited approximately twenty minutes, then took the Defendant for a breathalyzer test, using a Smith & Wesson 900-A.

(Again, the officer's notes originally indicated that the test was given at "0009 hours" but in May, because the officer did not believe that made sense, he changed his note to reflect "1009 hours". (Tr. 9/28/89, p. 76).)

No printout was made from the breathalyzer machine, no copy of any printout was attempted to be made from the machine, and no copy of any printout was given to the Defendant. (Tr. 9/28/89, p. 3,4,29-33). Though the Smith & Wesson 900-A is capable of giving a printout as to its results (Tr. 9/28/89, p. 8-9), and though the printout would verify the calibration and results of the test, (Tr. 9/28/89, p. 25-26), the Commonwealth (Consolidated Labs) chose not to use the paper printout from the machine, so as to not confuse the results

when the case came to Court. (Tr. 9/28/89, p. 19-20).

The Court considered argument and denied the Motion to Suppress the certificate of breathalyzer analysis for failure to comply with the last sentence of §18.2-268(c) of the 1950 Code of Virginia, as amended, (Tr. 9/28/89, p. 35-53).

The Defendant had attempted to subpoena the breathalyzer operator, but had been unable to effect service. The Commonwealth had indicated an intent to have her present, but she was not. The certificate indicated that the sample was taken at "0131 hours" (Commonwealth's Exhibit 1), and the warrant indicated it was issued at "0124 hours" (Tr. 9/28/89, p. 78-79). Officer Geis testified that the times had to be wrong, because the

warrant was not issued until after the breathalyzer sample had been taken and the breathalyzer test had been completed. He also indicated the times were written in his handwriting. It is clear that the officer has no independent recollection as to what time the test was given, what time the sample was taken, or what time the warrant was issued. But he is certain that at least one is incorrect. (Tr. 9/28/89, p. 75-80). The Motion to Suppress the certificate as being inaccurate was denied (Tr. 9/28/89, p. 87-88) and the Motion to Strike was also denied. (Tr. 9/28/89, p. 97-98).

The Defendant offered Dr. Michael Mercado as an expert witness who had attended medical school and dental school, and had expertise in the fields of chemistry and pharmacology (Tr.

9/28/89, p. 103) and he was qualified by the Court as an expert witness. (Tr. 9/28/89, p.—105). He testified that he observed the dental work of the Defendant on March 3, 1989 (only several days after the incident complained of in the warrant (Tr. 9/28/89, p. 106), and that he had reviewed the dental records of the Defendant.

He further testified that the Defendant had had significant poor dental work with porous material holding his bridgework (Tr. 9/28/89, p. 105-111). He testified that the gums acted as "flaps" over the bridgework, which would retain liquids which were consumed, including alcohol, in the porous cement areas underneath the flaps which bonded the bridgework to his mouth. The doctor then testified to a reasonable degree of

medical certainty that if the Defendant had consumed alcohol within twelve to twenty-four hours prior to the time of his breathalyzer test on February 26, 1989, he would have retained alcohol in his mouth, which would be dislodged when he blew into the breathalyzer machine from his mouth. He testified to a reasonable degree of medical certainty that the Defendant would continue to have alcohol in his mouth for twelve to twenty-four hours after consumption, and that that condition existed on February 26, 1989, and that if he had blown into a breathalyzer machine within that period of time, some of the alcohol which was retained in his mouth would be blown into the machine. (Tr. 9/28/89, p. 111-120).

The Defendant then offered Richard Huffer as an expert breathalyzer

operator, which was accepted by the Court. (Tr. 9/28/89, p. 121). He testified that the Smith & Wesson 900-A measures alcohol as blown from the mouth, and that if any residual alcohol was in the mouth, for any reason, the results of a breathalyzer test would not be accurate. The Commonwealth offered no rebuttal evidence (Tr. 9/28/89, p. 125) and the Defendant renewed his Motion to Strike, which was denied.

The Defendant was thereafter found guilty of driving while intoxicated pursuant to §18.2-266 of the 1950 Code of Virginia, as amended, and pursuant to the final Order, a copy of which is attached hereto as Appendix B.

## ARGUMENT

### QUESTION I

Did the court err in not striking the evidence in that the police officer

did not have a reasonable, articuable suspicion to stop the Defendant where the officer's only reason to stop the Defendant was the Defendant driving with his bright lights and there was no evidence that raised a suspicion of criminal activity?

In the instant case, there is no reasonably articuable or articulated suspicion. There is no testimony by Officer Geis that he had any reason to suspect any criminal conduct. Driving with one's high beams on, which is all the officer observed, in and of itself is not an offense. It was never established that there existed reasonably articuable grounds for suspicion of criminal conduct. Driving with one's high beams on is not a violation of law. In fact, it was required that the Defendant's vehicle have high beams which are operable. §46.1-260 and 46.1-272 of the

1950 Code of Virginia, as it existed in 1989, and People v. Meola, 165 N.E.2d 851, 7 NY2d 291 (1960). The law that existed at the time required the Defendant to have high beams capable of operation, and the law permitted the use of high beams.

There was no testimony or evidence offered that Officer Geis had any reason to believe, based on his experience, the Defendant's driving behavior had raised any reasonable, articuable suspicion of any criminal activity.

A police officer may stop a vehicle when he has reasonably articuable suspicion that criminal activity is apparent. Terry v. Ohio, 392 U.S. 1, 88 S.C. 1868, 20 L.Ed.2d 889 (1968), Delaware v. Prouse, 440 U.S. 648, 99 S.C. 1391, 59 L.Ed.2d 660 (1979), DePriest v.

Commonwealth, 4 Va.App. 577, 359 SE2d 540 (1987), Stroud v. Commonwealth, 6 Va.App. 633, 370 S.E.2d 721 (1988), and Murphy v. Commonwealth, 9 Va.App. 139, 384 S.E.2d 125 (1989), and Zimmerman v. Commonwealth, 234 Va. 609, 336 S.E.2d 208 (1988). The reasonable suspicion must be based on specific, objective facts, which may be particularized and objectively stated. Mere suspicion is not sufficient. DePriest v. Commonwealth, ibid. A particularized suspicion is not achieved by the mere presence of a drug courier profile. Although the Defendant in the instant case was driving with his high beams on, he had broken no laws, and without more there is no articuable suspicion sufficient to stop the Defendant. In Murphy v. Commonwealth the police officer

testified that he had noted nothing unusual or suspicious about Murphy's vehicle or the operation of it, except for the fact that it turned prior to reaching the roadblock. Murphy v. Commonwealth, 9 Va. App. 39, 384 S.E.2d 125. A stop which does not meet the test of a reasonable articuable suspicion is violative of the defendant's Fourth and Fourteenth Amendment rights. The Commonwealth has the burden to prove the stop was legal. Murphy v. Commonwealth, ibid.

In DePriest v. Commonwealth there were articuable facts supporting the reasonable suspicion that the Defendant had committed a criminal offense. There the police officers observed the Defendant having hand to hand contact and exchanging money for some objects put in

the Defendant's pocket. Evidence was offered that some of the individuals involved were known drug offenders. The officer further testified that, based on his experience and observations of the Defendant and other suspects for three and one-half hours, he reasonably suspected that what had occurred was a drug transaction.

In Stroud v. Commonwealth the police officer testified that, "based on his eleven years of experience with the State Police, he suspected from the driver's conduct that he was either unlicensed or otherwise in violation of the law". The officer had observed the man make a U-turn and drive away from a roadblock. The suspicion was articulated and articuable.

However, in the present case, there

is no reasonably articuable or articulated suspicion. There was no testimony by Officer Geis that he had any reason to suspect any criminal conduct.

Driving with one's high beams on, which is all the officer observed, in and of itself, is not an offense and was never established as a reasonably articuable grounds for suspicion of criminal conduct. Driving with one's bright lights on is not a violation of law. §46.1-272 of the 1950 Code of Virginia, as it existed in 1989, and People v. Meola, 165 NE2d 851, 7 NY2d 291 (1960). Furthermore, there was no testimony by Officer Geis that he had any reason to believe, based on his experience, that the Defendant's driving behavior or use of bright lights had raised reasonably articuable suspicion of

any criminal activity.

QUESTION II

Did the court err in not suppressing the breathalyzer certificate as no printout was made of the breathalyzer test and no printout was given to the Defendant denying the Appellant due process and equal protection of the law, denying him potential exculpatory evidence, denying him effective cross-examination of government witnesses and denying him the right to effective assistance of counsel?

§18.2-268 of the 1950 Code of Virginia, as it was amended in 1985 and existed in 1989, provides in the last sentence of §(c) relating to the breath test:

> If such equipment automatically produces a written printout of the breath test result, this written printout, or a copy thereof, shall be given to the accused in each case.

The language of the statute is clear and unequivocal. The evidence established the Defendant was tested by using a Smith & Wesson 900-A. The

evidence established that the Smith & Wesson 900-A is capable of giving a written printout of the breath test result. If a printout was made from the 900-A it would verify that the machine had been properly calibrated and verify the reading of the test result. (Tr. 9/28/89, p. 25). The reason not to use the certificate was so there would not be results which were "confusing" or could rebut the breathalyzer certificate as written by the breathalyzer operator. The reason to not use a printout is that the evidence of the breathalyzer certificate could not be rebutted or impeached! (Tr. 9/28/89, p. 19-20). That is no different that a police officer destroying evidence so that a defendant has no exculpatory evidence. It is only made worse because it is a

policy of the state in all cases!

Due process requirements and Brady material would normally require that the Commonwealth protect any exculpatory evidence. Brady v. Maryland, 373 US 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, (1963). Nevertheless, Brady in and of itself does not give rise to this requirement. However, the legislature enacted the last sentence of §(c) in 1985, using mandatory language. It must be that the legislature intended the Commonwealth would follow the mandatory language. This language statutorily mandates potential Brady material.

Equal protection of the law would demand that the Defendant be given the same rights as a defendant who had elected to take a blood test. The Code clearly requires two blood tests. See

§18.2-268(g) and (h), of the 1950 Code of Virginia, as amended. In Commonwealth v. Lee, Criminal Law No. 55859, 3 VLW 175 (1988), the Fairfax County Circuit Court recognized that where only one of the blood tests was returned and there was no reasonable explanation as to why there was a failure to comply with obtaining the second blood test, the certificate should not be admitted into evidence. Frequently, as the Court knows, blood tests produce different results...errors occur. Likewise, there is the chance of error in reading the breath tests, which is why the legislature required that if a printout was available, that a copy be given to the defendant. In Brooks v. Newport News, 224 Va. 311, 295 SE2d 801 (1982), the Court ruled that where the breathalyzer operator did not have a

valid license, the breathalyzer certificate should not have been admitted into evidence and should have been suppressed; that no presumption (inference) would rise, as there was no certificate. See Williams v. Commonwealth, 10 Va.App. 636, ___ S.E.2d ___ (July 31, 1990). In Gray v. Commonwealth, 220 Va. 943, 265 SE2d 705 (1980), the Supreme Court of Virginia considered a case pursuant to §19.2-187 of the 1950 Code of Virginia, as amended, dealing with the admission into evidence of a certificate of drug analysis. The Court said that the Virginia Code establishes an exception to the hearsay rule (as does §18.2-268) and unless the Commonwealth strictly complies with filing a copy of the certificate at least seven days prior to the hearing or trial,

the certificate is inadmissible and that is so even though there was no prejudice to the Defendant. In Kyhl v. Commonwealth, 205 Va. 240, 135 SE2d 768 (1964), the Court would not allow breath test results into evidence pursuant to §18.1-55 (now contained in successor §18.2-268) where the evidence failed to show that the needle used in removing the blood was sterilized. The Court similarly held in Brush v. Commonwealth, 205 Va. 312, 136 SE2d 864 (1964).

The trial court found that the 900-A did not automatically give a printout, because the operator needed to affirmatively do something to obtain a printout. However, it must be assumed that the legislature intended to mean something when it added the last sentence to §(c) in 1985. Only the 900-A was used

in Virginia. Therefore, the legislature must have been referring to the equipment already existing and in use.

Furthermore, it must be assumed that the legislature intended some protection for a defendant or some other guarantee that the tests were performed properly similar to there being a requirement that two blood tests be performed. No machine is totally automatic. Machines require that paper be put into them. Machines require ink be put into them. Machines require that someone turn them on, flip a switch or press a button for the machine to print a result. (It must be turned on or told to do something and if it has no paper or ink put in it cannot print a result!) Though some machines may be more automated than others, it does not vitiate the requirements of

§(c), nor does it mean that an older machine which is not computerized in not automatic. The 900-A is capable of making a printout (capable of action) and requires that paper and ink be put in the machine and that the plactic switch be pressed so as to provide a "permanent" record of the breathalyzer reading. The key to automation is that the permanent record is not subject to interpretation or change by the breathalyzer operator. Here, the Commonwealth was required to make a printout of the test results and to provide a copy to the Defendant. The Commonwealth did not do so, and therefore the breathalyzer certificate should have been suppressed and should not have been admitted into evidence.

In the alternative, there has been established an independent class withoug

justification: (1) Those defendants given a blood test [which has a two lab procedure] and those defendants given a breathalyzer on a machine which automatically prints results; (2) Those defendants given a breathalyzer which provides a printout, but not automatically; (3) And those given a breathalyzer that does not provide a printout at all. There is no rational basis for treating defendants who are given a breathalyzer which manually provides a printout any differently from defendants who are given blood tests and defendants are given breathalyzers which automatically give printouts. To do so is to deny equal protection of the law to defendants who are given breathalyzer tests on machines which only manually printout results. The Defendant,

Appellant herein, falls into this class and is denied equal protection and due process of the law. The Defendant is further denied the opportunity to effectively cross-examine the officer and breathalyzer operator, and further, he is denied effective assistance of counsel. See United States v. Wade, 388 U.S. 218, (87 S.Ct. 1926), 18 L.Ed.2d 1149 (1967).

## QUESTION III

Did the court below err in considering the breathalyzer test (and/or not striking it) and in finding the Defendant guilty where a qualified expert witness testified, to a reasonable degree of medical certainty, that the Defendant had alcohol in his mouth at the time of the breathalyzer test, and another qualified expert witness testified that then the breathalyzer results were inaccurate, said evidence being unrebutted and inherently credible and the Court retained then a presumption that the Defendant was guilty, there being no other evidence of the Defendant's alcohol level?

§18.2-268(o) of the 1950 Code of Virginia provides:

> In any trial for a violation of §18.2-266, or of a similar ordinance of any county, city of town, this section shall not otherwise limit the introduction of any relevant evidence bearing upon the question at issue before the Court, and the Court shall, regardless of the result of the blood or breath test or tests, if any, consider such other relevant evidence of the condition of the accused as shall be admissible in evidence.

In the instant case, the Court qualified Dr. Michael Mercado and Mr. Huffer. Dr. Mercado testified beyond a reasonable degree of medical certainty, that if the Defendant had consumed alcohol within twelve to twenty-four hours prior to the breath test, he would still have alcohol in his mouth at the time the test was given. Dr. Mercado also testified that if during that twelve to twenty-four hour period, the Defendant

blew into some device to measure alcohol, the alcohol measured would include alcohol that remained in his mouth.

Here, the Defendant, to a reasonable degree of medical certainty, had alcohol remaining in his mouth at the time the breathalyzer test was given (assuming he had consumed alcohol) the results of the breathalyzer test were not accurate. The Commonwealth never offered any evidence to rebut the evidence so offered by the Defendant. In Williams v. Commonwealth, ibid., the Court considered use of a blood test where there was a question as to the vial of blood having been sealed and reversed the cause finding that accuracy of the sample was in doubt and could not be relied upon as a basis for conviction. There the Court remanded to determine if other evidence was

sufficient for conviction.

The Court must consider the evidence that the results of the breath test were inaccurate, where there is no conflict as to that testimony, and the testimony stands uncontradicted. In Epperson v. DeJarnette, 164 Va. 482, at 485, 180 SE 412 (1935), the Court said:

> While the jury is the judge of the weight of testimony and the credibility of witnesses, it cannot arbitrarily disregard the uncontradicted evidence of an unimpeached witness which is not inherently incredible and not inconsistent with other facts and circumstances appearing in the record, even though such witnesses are interested in the results of the litigation.

In the present case, the credibility of the witnesses was never challenged, the witnesses' testimony was never contradicted, and the witnesses were not impeached. The testimony in the instant case was not inherently incredible, and

clearly is not inconsistent with the other facts and circumstances. Assuming, arguendo, that everything the Commonwealth indicated about the breath test was correct, nothing offered by the expert witnesses contradicted the direct evidence, but merely indicated that under the facts and circumstances as provided, the evidence was tainted, and the results would therefore be inaccurate. That given, the Court should have stricken the evidence of the blood alcohol content of .20% and the trial judge should thereafter, recognizing that the breathalyzer tests were shown to be inaccurate, have dismissed the case. The Court cannot arbitrarily determine that the evidence is speculative when unimpeached and unrebutted.

By statute, as well as the U.S. and

Virginia Constitutions, the Defendant had a right to offer evidence as provided hereinabove. He clearly has this right under "due process" clause of the Constitution. However, §(o) goes further and requires that the Court not limit the introduction of relevant evidence bearing upon the issue before the Court, and that it shall consider such other relevant evidence. Often times, the Court considers that §18.2-268 gives rise to a presumption of intoxication. (See §18.2-269 of the 1950 Code of Virginia, as amended.)

However, it is clear that this should not give rise to a true presumption, but rather a permissible inference. The only true presumption in a criminal case is that the accused is presumed to be innocent, and the burden

never shifts from the Commonwealth. See Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). Although a Court is not normally required to consider other evidence, where the statute requires the Court to consider such evidence, and such evidence rebuts a mere inference, then the inference must fail unless the Commonwealth introduces some rebuttal evidence.

The burden is on the Commonwealth to show the Defendant is guilty, and not on the Defendant to show that he is not guilty. Clemmer v. Commonwealth, 208 Va. 661, 159 SE2d 664 (1968).

However, in the instant case, it is clear that the Court did not consider the breathalyzer results as a permissible inference or as a rebuttable presumption. It is clear, as aforesaid, that the

Defendant offered sufficient evidence to rebut any inference. The Commonwealth offered no contrary evidence. Nevertheless, the Virginia Court of Appeals in its Order entered on July 10, 1990, apparently continues to recognize that the Defendant had a blood-alcohol content of .20% as a basis for supporting his conviction. To do so is to allow the presumption to continue and to not treat the "presumption" of §18.2-268 and §18.2-269 as an inference or as truly rebuttable. Although the statute may have provided that the presumption may be rebutted, it is clear from the decision of the Court of Appeals of Virginia that it does not treat the statute or the inference as rebuttable and therefore, the Defendant is denied his due process rights, and the statute, as it has been

applied to the Appellant, fails as provided in Mullaney v. Wilbur.

To allow the breathalyzer test to stand in the facts and circumstances in this case is so wanton in fairness as to effectively deny the Defendant his due process. See Stovall v. Denno, 388 U.S. 293, (87 S.Ct. 1967), 18 L.Ed.2d 1199 (1967).

## CONCLUSION

There was no evidence offered as to why Officer Geis pulled General Secord over, except for that he was driving a vehicle operated with high beams. There was no evidence indicating that was improper, nor was there any evidence that gave rise to a suspicion of criminal activity. There was no reasonable,

articulable suspicion to stop General Secord introduced in evidence. Where the Department of Consolidated Labs has made an election to not provide the printout from the Smith & Wesson 900-A so that defense attorneys will not have an opportunity to defend based upon inconsistent results, it is not only an affront to our fundamental system of jurisprudence, but is an affront to the legislature which adopted a statute requiring a certificate be provided and a copy given to a defendant. It is a clear denial of due process and equal protection of the law.

Once the qualified experts testified that the results of the breathalyzer test were unreliable in these circumstances and where that unrebutted, unchallenged testimony was inherently credible, the

breathalyzer results should not have been considered by the trial court. Certainly, the certificate, which was shown to be inaccurate, should have been stricken as evidence in this cause.

The expert evidence offered by the Defendant, which was unrebutted, added to the Commonwealth's own evidence that the breathalyzer certificate was inaccurate, and where no printout of the breathalyzer certificate was provided, collectively suggests that the Court should not have admitted the certificate, should have suppressed the certificate, or at best, should have given little weight to the certificate, and that it should have dismissed the case against the Defendant.

Apparent in the decision of the Court of Appeals of Virginia is that the presumption is not really rebuttable...

that it is more than an inference. The law cannot be applied to presume guilt and that is effectively how the lower court has treated §18.2-268 in this case.

WHEREFORE, the Defendant prays the Honorable Court grant his Petition for Writ of Certiorari herein and ultimately reverse and dismiss this cause; and for such other and further relief as it deems meet and proper in these premises.

ORAL ARGUMENT IS HEREBY REQUESTED.

Respectfully submitted,

RICHARD V. SECORD
By counsel

GARVER & MOLLER

By: _____

Steven M. Garver, Esquire
Counsel for Appellant
11707 Bowman Green Drive
P.O. Box 2430
Reston, Virginia 22090
(703)471-1090

# Appendix A

COMMONWEALTH OF VIRGINIA

CERTIFICATE OF BREATH ALCOHOL ANALYSIS

DEPARTMENT OF GENERAL SERVICES
DIVISION OF CONSOLIDATED LABORATORY SERVICES
BUREAU OF FORENSIC SCIENCE

CG 3/29
GEIS #2242 DATE OF REPORT 2-26-89

| NAME OF ACCUSED | NAME OF COURT |
|---|---|
| Secord, Richard Vernon | Fx. Co. Gen. Dist. |

| BREATH ANALYSIS CONDUCTED BY | AGENCY |
|---|---|
| V. Shanholtz | FCPD |

| | |
|---|---|
| DCLS LICENSE NUMBER | 88077648 |
| LICENSE EXPIRES | 9-1-90 |
| DATE CONDUCTED | 2-26-89 |

TIME SAMPLE WAS TAKEN 0131

TEST EQUIPMENT INSTRUMENT NUMBER 1020445 WAS TESTED FOR ACCURACY BY DIVISION OF CONSOLIDATED LAB. SVCD, AND FOUND ACCURATE ON: 1-11-89

RESULTS: BLOOD ALCOHOL CONTENT 0.20 % BY WEIGHT BY VOLUME.

ATTEST:
I CERTIFY THAT THE ABOVE IS AN ACCURATE RECORD OF THE TEST CONDUCTED; THAT THE TEST WAS CONDUCTED WITH THE TYPE OF EQUIPMENT AND IN ACCORDANCE WITH THE METHODS APPROVED BY THE DIVISION OF CONSOLIDATED LABORATORY SERVICES; THAT

THE TEST WAS CONDUCTED IN ACCORDANCE WITH THE DIVISION'S SPECIFICATIONS; THAT THE EQUIPMENT ON WHICH THE BREATH TEST WAS CONDUCTED HAS BEEN TESTED WITHIN THE PAST SIX MONTHS AND FOUND TO BE ACCURATE AND THAT I POSSESS A VALID LICENSE TO CONDUCT SUCH TEST, GIVEN UNDER MY HAND THIS 26TH DAY OF FEBRUARY, 1989.

BREATH TEST OPERATOR
V. Shanholtz

STATE OF VIRGINIA, COUNTY OR CITY OF
SUBSCRIBED AND SWORN TO BEFORE ME THIS

_____ _____
DAY OF _____19_____

NOTARY PUBLIC, MAGISTRATE, CLERK OR DEPUTY CLERK OF COURT

_____

MY COMMISSION EXPIRES

_____

FOR DEFENDANT

Appendix B

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA )
CRIMINAL NO. 61012

VERSUS )

RICHARD V. SECORD )
APPEAL - DRIVING
WHILE INTOXICATED

FINAL ORDER

On September 28, 1989, the Commonwealth's Attorney, the Defendant, RICHARD V. SECORD, and Steven Garver, Counsel for the Defendant, appeared before this Court. The Defendant appeared while on bond.

Counsel for the Defendant moved the Court with a motion to suppress the certificate from the breatholyzer machine, which motion the Court, after hearing argument, denied.

The Defendant waived arraignment upon the warrant and the Defendant entered a plea of not guilty. The Court proceeded to hear and to determine the case without the intervention of a jury, trial by

jury having been waived, to which the Attorney for the Commonwealth consented and the Court concurred.

The Court then proceeded to hear all of the evidence presented on behalf of the Commonwealth.

Counsel for the Defendant renewed his motion to suppress, which motion the Court, after hearing argument, denied.

The Court heard all of the Defendant's evidence and argument of Counsel.

Counsel for the Defendant moved the Court to strike the evidence presented by the Commonwealth's Attorney, which motion the Court, denied.

TAF/knj
61012

In consideration of the evidence heard and argument of Counsel, the Court found the Defendant, RICHARD V. SECORD, guilty of DRIVING WHILE INTOXICATED as charged in the warrant.

The Court ORDERED that the Defendant serve thirty (30) days in jail and pay a fine in the amount of $%200.00 and pay costs of this case. The Court further ORDERED that the Defendant;s license to drive be suspended for six (6) months. All of the jail sentence was suspended conditioned upon the Defendant's good behavior for a period of one (1) year.

Counsel for the Defendant moved the Court to suspended imposition of sentence pending the appeal, which motion the Court, granted.

The Court ORDERED that a appeal bond be set in the amount of $500.00. In the event the Defendant perfects the appeal of this case, execution of the sentence imposed shall be suspended pending the decision of the Court of Appeals.

The Defendant was released upon the aforesaid conditions.

Entered on October 10th, 1989.

JUDGE

THOMAS A. FORTKORT

ADDRESS: 1157 Arbor Glen Way, Reston, Virginia 22094
DOB: 07-06-32
SSN/OL#: 302-24-7854; STATE: VA
STATUTE: 18.2-266
VIOLATION: State
DOO: 02-26-89
OL SURRENDERED: No
DATE OF REPORT: October 10, 1989

Original retained in the office of the Clerk of the Circuit Court of Fairfax County, Virginia

A COPY TESTE:
WARREN E. BARRY, CLERK

By: Tracey A. Davison
Deputy Clerk

TAF/knj
61012

Appendix C

**VIRGINIA:**

In the Court of Appeals of Virginia on Tuesday the 10th day of July, 1990.

Richard V. Secord,
Appellant

against Record No. 1562-89-4
Circuit Court No. CR61012

Commonwealth of Virginia,
Appellee

From the Circuit Court of Fairfax County

Before Chief Judge Koontz,
Judges Duff and Keenan

This petition for appeal is denied for the following reasons:

Issue 1. The failure of the petitioner to dim his headlights in violation of Code §46.1-272 constituted reasonable articulable suspicion for the stop of his

vehicle pursuant to Delaware v. Prouse, 440 U.S. 648 (1979).

Issue 2. The trial court did not err in denying petitioner's motion to suppress the results of his breath test because the printout available on the equipment in question was not "automatically" produced within the meaning of Code §18.2-268(C).

Issue 3. The evidence, as viewed in the light most favorable to the Commonwealth, Martin v. Commonwealth, 4 Va.App. 438, 443, 358 S.E.2d 415, 418 (1987), was sufficient to establish that the petitioner was arrested within two hours of the time of the offense as

required by Code §18.2-268(B).

Issue 4. When viewed in accordance with the standard of review set forth in Martin v. Commonwealth, 4 Va.App. 438, 443, 358 S.E. 2d 415, 418 (1987), the evidence that the petitioner had a blood-alcohol content of .20 percent, that he had a strong odor of alcohol about his person, that his eyes were glazed, that he swayed slightly, and that he failed to perform completely two field sobriety tests was sufficient to support his conviction under Code §18.2-266.

A Copy,

Teste:

Patricia G. Davis, Clerk

By: Marty K.P. Ring

Deputy Clerk

Appendix D

**VIRGINIA:**

In the Court of Appeals of Virginia on Tuesday the 7th day of August, 1990.

Richard V. Secord,
Appellant

against

Record No. 1562-89-4
Circuit Court No. CR61012

Commonwealth of Virginia,
Appellee

Upon a Petition for Rehearing

Before Chief Judge Koontz, Judges Duff and Keenan

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 10th day of July, 1990, and grant a rehearing thereof, the said petition is denied.

A Copy,

Teste:

Patricia G. Davis, Clerk

By: Cynthia L. McCoy

Deputy Clerk

Appendix E

§ 18.2-266. Driving motor vehicle, engine, etc., while intoxicated, etc. -It shall be unlawful for any person to drive or operate any motor vehicle, engine or train (i) while such person has a blood alcohol concentration of 0.10 percent or more by weight by volume as indicated by a chemical test administered in accordance with the provisions of § 18.2-268, (ii) while such person is under the influence of alcohol, (iii) while such person is under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature, or any combination of such drugs, to a degree which impairs his ability to drive or operate any motor vehicle, engine or train safely, or (iv) while such person is under the combined influence of alcohol and any drug or drugs to a degree which impairs his

ability to drive or operate any motor vehicle, engine or train safely. For the purposes of this section, the term "motor vehicle" shall include mopeds, while operated on the public highways of this Commonwealth. (Code 1950, § 18.1-54; 1960, c. 358; 1975, cc. 14, 15; 1977, c. 637; 1984, c. 666; 1986, c. 635; 1987, c. 661.)

Appendix F

§ 18.2-268. Use of chemical test to determine alcoholic or drug content of blood; procedure; qualifications and liability of person withdrawing blood; costs; evidence; suspension of license for refusal to submit to test; localities authorized to adopt parallel provisions. - A. As used in this section "license" means any driver's license, temporary driver's license, or instruction permit authorizing the operation of a motor vehicle upon the highways.

B. Any person, whether licensed by Virginia or not, who operate(s) a motor vehicle upon a public highway in this Commonwealth shall be deemed thereby, as a condition of such operation, to have consented to have samples of his blood or breath or both blood and breath taken for a chemical test to determine the

alcoholic or drug or both alcoholic and drug content of his blood, if such person is arrested for violation of § 18.2-266 or of a similar ordinance of any county, city or town within two hours of the alleged offense.

C. Any person so arrested for a violation of § 18.2-266(i) or § 18.2-266 (ii) or both or of a similar ordinance of any county, city or town shall elect to have either the blood or breath sample taken, but not both. If either the blood test or the breath test is not available, then the available test shall be taken. However, it shall not be a matter of defense if the blood test or the breath test is not available. In addition, if the accused elects a breath test, he shall be entitled, upon request, to observe the process of analysis and to see the blood-alcohol reading on the

equipment used to perform the breath test. If such equipment automatically produces a written printout of the breath test result, this written printout, or a copy thereof, shall be given to the accused in each case.

D. A person, after being arrested for driving under the influence of any drug or combination of drugs or the combined influence of alcohol and any drug or drugs, may be required to submit to tests to determine the alcoholic or drug or both alcoholic and drug content of his blood. If a person, after being arrested for a violation of § 18.2-266 (i) or § 18.2-266 (ii) or both, chooses to submit to a breath test in accordance with subsection C of this section, that person may also be required to submit to tests to determine the drug content of his blood if the law-enforcement officer has

reasonable cause to believe the person was driving under the influence of any drug or combination of drugs or the combined influence of alcohol and drugs.

E. If a person after being arrested for a violation of § 18.2-266 or of a similar ordinance of any county, city or town and after having been advised by the arresting officer that a person who operates a motor vehicle upon a public highway in this Commonwealth shall be deemed thereby, as a condition of such operation, to have consented to have samples of his blood or breath taken for chemical tests to determine the alcoholic or drug or both alcoholic and drug content of his blood, and that the unreasonable refusal to do so constitutes grounds for the revocation of the privilege of operating a motor vehicle upon the highways of this Commonwealth,

then refuses to permit the taking of a sample of his blood or breath or both blood and breath for such tests, the arresting officer shall take the person arrested before a committing magistrate. If he again so refuses after having been further advised by such magistrate of the law requiring blood or breath or both blood and breath tests to be taken and the penalty for refusal, and so declares again his refusal in writing upon a form provided by the Division of Consolidated Laboratory Services (hereinafter referred to as Division), or refuses or fails to so declare in writing and such fact is certified as prescribed in subsection P, then no blood or breath samples shall be taken even though he may thereafter request same.

F. Only a physician, registered professional nurse, graduate laboratory

technician or a technician or nurse designated by order of a circuit court acting upon the recommendation of a licensed physician, using soap and water, polyvinylpyrrolidone iodine or benzalkonium chloride to cleanse the part of the body from which the blood is taken and using instruments sterilized by the accepted steam sterilizer or some other sterilizer which will not affect the accuracy of the test, or using chemically clean sterile disposable syringes, shall withdraw blood for the purpose of determining the alcoholic or drug or both alcoholic and drug content thereof. It shall be unlawful for any person to reuse single-use-only needles or syringes. Any such person convicted of reusing single-use-only needles or syringes shall be guilty of a Class 3 misdemeanor. No civil liability shall attach to any

person authorized to withdraw blood as provided herein as a result of the act of withdrawing blood from any person submitting thereto, provided the blood was withdrawn according to recognized medical procedures. The foregoing shall not relieve any such person from liability for negligence in withdrawing of any blood sample.

G. Adequate portions of the blood samples so withdrawn shall be placed in vials provided by the Division which vials shall be sealed and labeled by the person taking the sample or at his direction, showing on each the name of the accused, the name of the person taking the blood sample, and the date and time the blood sample was taken. The vials shall be divided between two containers provided by the Division, which containers shall be sealed so as

not to allow tampering with the vial. The arresting or accompanying officer shall take possession of the two containers holding the vials as soon as the vials are placed in such containers and sealed, and shall transport or mail one of the containers forthwith to the Division. The officer taking possession of the other container (hereinafter referred to as the second container) shall, immediately after taking possession of the second container, give to the accused a form provided by the Division which shall set forth the procedure to obtain an independent analysis of the blood in the second container, and a list of those laboratories approved by the Division and their addresses. Such form shall contain a space for the accused or his counsel to direct the officer possessing such second

container to forward that container to such approved laboratory for analysis, if desired. The officer having the second container, after delivery of such form (unless at that time directed by the accused in writing on the form to forward the second container to an approved laboratory of the accused's choice, in which event the officer shall do so), shall deliver the second container to the chief police officer, or his duly authorized representative, of the county, city or town in which the case will be heard. The chief police officer or his representative upon receiving the same shall keep it in his possession for a period of seventy-two hours, during which time the accused or his counsel may, in writing, on the form provided hereinabove, direct the chief police officer having possession of the second

container to mail it to the laboratory of the accused's choice chosen from the approved list. As used in this section, the term "chief police officer" means the sheriff in any county not having a chief of police, the chief of police of any county having a chief of police, the chief of police of the city or the sergeant or chief of police of the town in which the charge will be heard.

H. The testing of the contents of the second container shall be made in the same manner as hereafter set forth concerning the procedure to be followed by the Division, and all procedures established herein for transmittal, testing and admission of the result in the trial of the case shall be the same as for the sample sent to the Division, provided that an analysis of the second blood sample to determine the presence of

a drug or drugs shall not be performed unless an analysis of the first blood sample by the Division has indicated the presence of such drug or drugs.

I. A fee not to exceed twenty-five dollars shall be allowed the approved laboratory for making the analysis to determine the alcoholic content of the second blood sample, which fee shall be paid out of the appropriation for criminal charges. A fee not to exceed the amount established on a schedule of fees to be published by the Division for the required procedure or procedures shall be allowed the approved laboratory for making an analysis of the second blood sample to determine the presence of a drug or drugs, which fee shall be paid out of the appropriation for criminal charges. If the person whose blood sample was withdrawn is subsequently

convicted for violation of § 18.2-266, or of a similar ordinance of any county, city or town, the fee paid by the Commonwealth to the laboratory for testing the blood sample shall be taxed as part of the costs of the criminal case and shall be paid into the general fund of the state treasury.

J. If the chief police officer having possession of the second container is not directed as herein provided to mail it within seventy-two hours after receiving the container then the officer shall destroy such container.

K. Upon receipt of the blood sample forwarded to the Division for analysis, the Division shall cause it to be examined for alcoholic or drug or both alcoholic and drug content and the Director of the Division or his designated representative shall execute a

certificate which shall indicate the name of the accused, the date, time and by whom the blood sample was received and examined, a statement that the seal on the vial had not been broken or otherwise tampered with, a statement that the container was one provided by the Division and a statement of the alcoholic or drug or both alcoholic and drug content of the sample. The certificate shall accompany the vial from which the blood sample examined was taken and shall be returned to the clerk of the court in which the charge will be heard. The blood sample shall be destroyed after completion of the analysis by the Division. A similar certificate shall accompany the vial forwarded by the independent laboratory which analyzes the second blood sample on behalf of the accused and shall be returned to the

clerk of the court in which the charge will be heard. The blood sample shall be destroyed after completion of the analysis by the independent laboratory. On motion of the accused, such certificate shall be admissible in evidence when attested by the pathologist or by the supervisor of the laboratory approved by the Division.

L. When any blood sample taken in accordance with the provision of this section is forwarded for analysis to the Division, a report of the results of such analysis shall be made and filed in that office. Upon proper identification of the vial into which the blood sample was placed, the certificate as provided for in this section shall, when duly attested by the director of the Division or his designated representative, be admissible in any court, in any criminal or civil

proceeding, as evidence of the facts therein stated and of the results of such analysis.

M. Upon the request of the person whose blood or breath or both blood and breath sample was taken for chemical tests to determine the alcoholic or drug or both alcoholic and drug content of his blood, the results of such test or tests shall be made available to him.

N. A fee not exceeding ten dollars shall be allowed the person withdrawing a blood sample in accordance with this section, which fee shall be paid out of the appropriation for criminal charges. If the person whose blood sample was withdrawn is subsequently convicted for a violation of §18.2-266 or of a similar ordinance of any county, city or town, or is placed under the purview of a probational, educational, or

rehabilitational program as set forth in § 18.2-271.1, the amount charged by the person withdrawing the sample shall be taxed as part of the costs of the criminal case and shall be paid into the general fund of the state treasury.

O. In any trial for a violation of §18.2-266 or of a similar ordinance of any county, city or town, this section shall not otherwise limit the introduction of any relevant evidence bearing upon any question at issue before the court, and the court shall, regardless of the result of the blood or breath test or tests, if any, consider such other relevant evidence of the condition of the accused as shall be admissible in evidence. If the results of such a blood test indicate the presence of a drug or drugs other than alcohol, the test results shall be

admissible only if other competent evidence has been presented to relate the presence of drug or drugs to the impairment of the accused's ability to drive or operate any motor vehicle, engine or train safely. The failure of an accused to permit a sample of his blood or breath to be taken for a chemical test to determine the alcoholic or drug content of his blood is not evidence and shall not be subject to comment by the Commonwealth at the trial of the case, except in rebuttal; nor shall the fact that a blood or breath test had been offered the accused be evidence or the subject of comment by the Commonwealth, except in rebuttal.

P. The form referred to in subsection E shall contain a brief statement of the law requiring the taking of a blood or breath or both blood and breath samples

and the penalty for refusal, declaration of refusal and lines for the signature of the person from whom the blood or breath or both blood and breath sample is sought, the date and the signature of a witness to the signing. If such person refuses or fails to execute such declaration, the committing justice, clerk or assistant clerk shall certify such fact, and that committing justice, clerk or assistant clerk advised the person arrested that such refusal or failure, if found to be unreasonable, constitutes grounds for revocation of such person's license to drive. The committing or issuing justice, clerk, or assistant clerk shall forthwith issue a warrant charging the person refusing to take the test to determine the alcoholic or drug or both alcoholic and drug content of his blood, with a violation of

this section. The warrant shall be executed in the same manner as criminal warrants. Venue for the trial of the warrant shall lie in the court of the county or city in which the offense of driving under the influence of intoxicants is to be tried.

Q. The executed declaration of refusal or the certificate of the committing justice, as the case may be, shall be attached to the warrant and shall be forwarded, by the committing justice, clerk or assistant clerk to the court in which the offense of driving under the influence of intoxicants shall be tried.

R. When the court receives the declaration of refusal or certificate referred to in subsection Q together with the warrant charging the defendant with refusing to submit to having a sample of his blood or breath or both blood and

breath taken for the determination of the alcoholic or drug or both alcoholic and drug content of his blood, the court shall fix a date for the trial of the warrant, at such time as the court shall designate, but subsequent to the defendant's criminal trial for driving under the influence of intoxicants. Upon request, the defendant shall be granted a trial by jury on appeal to the circuit court.

S. The declaration of refusal or certificate under subsection Q, as the case may be, shall be prima facie evidence that the defendant refused to submit to the taking of a sample of his blood or breath or both blood and breath to determine the alcoholic or drug or both alcoholic and drug content of his blood as provided hereinabove. However, this shall not be deemed to prohibit the

defendant from introducing on his behalf evidence of the basis for his refusal to submit to the taking of a sample of his blood or breath or both blood and breath to determine the alcoholic or drug or both alcoholic and drug content of his blood. The court shall determine the reasonableness of such refusal.

T. If the court or jury finds the defendant guilty as charged in the warrant,the court shall suspend the defendant's license for a period of six months for a first offense and for one year for a second or subsequent offense or refusal within one year of the first or other such refusals. The time shall be computed as follows: the date of the first offense and the date of the second or subsequent offense. However, if the defendant pleads guilty to a violation of §18.2-266 or of a similar ordinance of a

county, city or town, the court may dismiss the warrant.

U. The court shall forward the defendant's license to the Commissioner of the Department of Motor Vehicles of Virginia as in other cases of similar nature for suspension of license unless the defendant appeals his conviction. In such case the court shall return the license to the defendant upon his appeal being perfected.

V. The procedure for appeal and trial shall be the same as provided by law for misdemeanors; if requested by either party, trial by jury shall be as provided in Article 4( § 19.2-260 et seq.) of Chapter 15 of Title 19.2, and the Commonwealth shall be required to provide its case beyond a reasonable doubt.

W. No person arrested for a violation of § 18.2-266 or similar ordinance of any

county, city or town shall be required to execute in favor of any person or corporation a waiver or release of liability in connection with the withdrawal of blood and as a condition precedent to the withdrawal of blood as provided for herein.

X. The court or the jury trying the case shall determine the innocence or the guilt of the defendant from all the evidence concerning his condition at the time of the alleged offense.

Y. Chemical analysis of a person's breath, to be considered valid under the provisions of this section, shall be performed by an individual possessing a valid license to conduct such tests, with a type of equipment and in accordance with the methods approved by the Division. Such breath-testing equipment shall be tested for its accuracy by the

Division at least once every six months.

The Division is directed to establish a training program for all individuals who are to administer the breath tests, of at least forty hours of instruction in the operation of the breath-test equipment and the administration of such tests. Upon the successful completion of the training program the Division may issue a license to the individual operator indicating that he has completed the course and is authorized to conduct a breath-test analysis.

Any individual conducting a breath test under the provisions of this section and as authorized by the Division shall issue a certificate which will indicate that the test was conducted in accordance with the Division's specifications, the equipment on which the breath test was

conducted has been tested within the past six months and has been found to be accurate, the name of the accused, the date, the time the sample was taken from the accused, the alcoholic content of the sample, and by whom the sample was examined. The certificate, as provided for in this section, when duly attested by the authorized individual conducting the breath test, shall be admissible in any court in any criminal or civil proceeding as evidence of the facts therein stated and of the results of such analysis. Any such certificate of analysis purporting to be signed by a person authorized by the Division shall be admissible in evidence without proof of seal or signature of the person whose name is signed to it. The officer making the arrest, or anyone with him at the time of the arrest, or anyone

participating in the arrest of the accused, if otherwise qualified to conduct such test as provided by this section, may make the breath test or analyze the results thereof. A copy of such certificate shall be forthwith delivered to the accused.

Z. The steps herein set forth relating to the taking, handling, identification, and disposition of blood or breath samples are procedural in nature ~~and~~ not substantive. Substantial compliance therewith shall be deemed to be sufficient. Failure to comply with any one or more of such steps or portions thereof, or a variance in the results of the two blood tests shall not of itself be grounds for finding the defendant not guilty, but shall go to the weight of the evidence and shall be considered as set forth above with all the evidence in the

case provided that the defendant shall have the right to introduce evidence on his own behalf to show noncompliance with the aforesaid procedure or any part thereof, and that as a result his rights were prejudiced.

AA. The governing bodies of the several counties, cities and towns are authorized to adopt ordinances paralleling the provisions of A through Z of this section. (Code 1950, § 18.1-55.1; 1964, c.240; c.635; 1970, c.622;1972, cc. 741, 756; 1973, c. 511; 1974, c. 591; 1975, cc.14, 15, 587; 1977, cc. 638, 659; 1978, c. 593; 1979, cc. 717, 728; 1980, c. 553; 1981, c. 553; 1981, c. 424; 1983, cc. 207, 365; 1984, cc.623, 666, 780; 1985, cc. 393, 597, 609; 1986, cc. 471, 475, 579; 1987, cc. 487, 661; 1988, cc. 454, 468.)

Appendix G

§ 18.2-269. Presumptions from alcoholic content of blood. - In any prosecution for a violation of § 18.2-266 (ii), or any similar ordinance of any county, city or town, the amount of alcohol in the blood of the accused at the time of the alleged offense as indicated by a chemical analysis of a sample of the accused's blood or breath to determine the alcoholic content of his blood in accordance with the provisions of § 18.2-268 shall give rise to the following rebuttable presumptions:

(1) If there was at that time 0.05 percent or less by weight by volume of alcohol in the accused's blood, it shall be presumed that the accused was not under the influence of alcoholic intoxicants;

(2) If there was at that time in excess of 0.05 percent but less than 0.10 percent by weight by volume of alcohol in the accused's blood, such facts shall not give rise to any presumption that the accused was or was not under the influence of alcoholic intoxicants, but such facts may be considered with other competent evidence in determining the guilt or innocence of the accused;

(3) If there was at that time 0.10 percent or more by weight by volume of alcohol in the accused's blood, it shall be presumed that the accused was under the influence of alcoholic intoxicants. (Code 1950, § 18.1-57; 1960, c. 358; 1964, c. 240; 1966, c. 636; 1972, c. 757; 1973, c. 459; 1975, cc. 14, 15; 1977, c. 638; 1983, c. 504; 1986, c. 635.)

Appendix H

§ 46.1-260. Head lamps on motor vehicles. - Every motor vehicle other than a motor cycle, road roller, road machinery or tractor used on a highway shall be equipped with at least two head lamps as approved by the Superintendent, at the front of an on opposite sides of the motor vehicle. (Code 1950, § 46-265; 1956, c. 639; 1958, c. 541.)

Appendix I

§46.1-272. **When dimming headlights, etc., required.** -- Whenever a vehicle is being operated upon a highway or a portion thereof which is sufficiently lighted to reveal any person or object upon such way at a distance of 350' ahead, the operator of such vehicle shall use 1 of the lowermost distributions of light or shall dim the head lamps if the vehicle has single beam lamps. Whenever a vehicle approaches an oncoming vehicle within 500' it shall be the duty of the operator of such vehicle to use 1 of the lowermost distributions of light so aimed that glaring rays are not projected into the eyes of the

oncoming driver or to dim the headlights if the vehicle has single beam lamps. whenever the operator of any motor vehicle approaches from the rear or follows within 200' of another vehicle proceeding in the same direction, such operator shall use the lowermost distribution s of light or shall dim the headlamps if the vehicle has single-beam lamps. (Code 1950, §46-279; 1954, c. 114; 1958, c. 541.)